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ATTORNEYS FOR DEFENDANT MICHAEL SIMS

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

The United States of America,

Plaintiff,

v.

Melvin Russell "Rusty" Shields, Michael Sims
and Sam Stafford,

Defendants.

CASE NO.CR12-00410 RMW

PRETRIAL CONFERENCE STATEMENT
OF MICHAEL SIMS

By and through his attorney, Frank R. Ubhaus, Defendant Michael Sims submits the following pretrial conference statement for the Court's consideration in advance of the Pretrial Conference Scheduled for October 17, 2013.

I. DISCLOSURE OF WITNESS STATEMENTS

Mr. SIMS is not in possession of any statements of witnesses expected to be called during his case-in-chief.

II. DISCLOSURE OF GRAND JURY TESTIMONY

As of this filing, the government has indicated that all testimony at the grand jury was by government employee witnesses. The government has not turned over any of these statements to the defense, although production is anticipated by the date of the pre-trial conference.

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1 III. STIPULATION OF FACTS

2 Counsel for Mr. Sims has reviewed the correspondence between counsel for Mr. Shields and
3 the government regarding proposed stipulations, as well as the Pretrial Conference statement of Mr.
4 Shields. The vast majority of the documents covered by the proposed stipulation do not involve Mr.
5 Sims, accordingly, whatever stipulation with respect to foundational issues agreed to by the co-
6 defendants and the government will be acceptable to Mr. Sims.

7 IV. COURT INTERPRETERS

8 Mr. Sims does not anticipate calling witnesses who will require the services of an interpreter.

9 V. DISMISSAL OF COUNTS

10 Mr. Sims is currently unaware of any counts which might be dismissed by the government in
11 an effort to streamline the trial of this matter and to conform to the witnesses listed by the
12 government as witnesses to be called at trial.

13 VI. JOINDER OR SEVERANCE

14 Mr. Sims believes the evidence will support the conclusion that, assuming Mr. Sims could be
15 found to be a part of the alleged conspiracy, Mr. Sims had effectively withdrawn from that alleged
16 conspiracy by as early as October 2007 and certainly by January 2008. Accordingly, Mr. Sims will
17 ask that the jury be instructed that evidence of events after the date of Mr. Sims' withdrawal should
18 not be considered in the determination of Mr. Sims guilt or innocence.

19 VII. PRIOR CONVICTION AND FRE 404(B) EVIDENCE

20 Mr Sims has a prior misdemeanor conviction in 1973. The government stated its intention to
21 introduce FRE 404(b) evidence regarding co-defendants Sims and Shields. Mr. Sims has reviewed
22 the evidence available with respect to the purported 404(B) evidence the government has referred to
23 with respect to Mr. Sims, and does not believe that such evidence meets the requirements for
24 admissibility set down in Rule 404(B) and would therefore request an evidentiary hearing outside the
25 presence of the jury before any reference is made to such evidence.

26 VIII. PRETRIAL EXCHANGE OF WITNESS LISTS

27 Mr. Sims has not currently identified any witnesses he intends to call in his case-in-chief. The
28 forensic accounting firm engaged by the defense continues their work, but that work is not complete,

1 and as such, no decision has been made as to whether Mr. Sims will seek to introduce their
2 testimony or reports.

3 IX. PRETRIAL EXCHANGE OF EXHIBITS

4 Mr. Sims has not currently identified any exhibits to be presented in his case-in-chief. Mr.
5 Sims' trial preparations continue, and he will provide documents to the government and counsel for
6 co-defendants Sims and Shields as they are identified for use in his case-in-chief.

7 X. PRETRIAL OBJECTIONS TO EXPECTED TESTIMONY AND EXHIBITS

8 The government stated that it will introduce both testimony and charts from one or more
9 expert or summary witnesses. The government has not indicated whether these witnesses will be
10 testifying as expert or summary witnesses. The government has not provided charts, statements, or a
11 list of materials and documents relied upon by these witnesses, but has promised to do so on October
12 21, 2013. Counsel for Mr. Sims joins in the concerns expressed by counsel for Mr. Stafford in his
13 pre-trial conference statement regarding the concerns raised at the October 3, 2013 motion to
14 continue. The forensic accountants engaged by the defense have indicated that they require thirty
15 days to properly evaluate the summary charts that will be provided by the government. Counsel for
16 Mr. Sims agrees with counsel for Mr. Stafford that it is not in Mr. Sims' interest to proceed with
17 trial and opening statements without a forensic evaluation of the charts the government intends to
18 introduce.

19 Timing aside, Mr. Sims anticipates in limine litigation as to the content and format of the
20 charts, as well as the scope of the witness testimony. Without knowing the contents of the charts, the
21 identities of the witnesses to be called, or whether the witnesses will testify as experts or not, Mr.
22 Sims cannot prepare appropriate motions in response.

23 XI. TRIAL BRIEFS AND MOTIONS IN LIMINE

24 In addition to the motions in limine anticipated to arise from the introduction of FRE 404(b)
25 evidence and summary charts, Mr. Sims wishes to submit tailored jury instructions and verdict forms
26 regarding the consideration of hearsay evidence and determination of loss amount. In addition, Mr.
27 Sims anticipates submitting in limine motions designed to limit the evidence the jury may consider
28 with respect to Mr. Sims as well as in limine motions striking referrals to the fact that Mr. Sims'

1 failed to disclose to investors that his real estate license was suspended and denied in 1978 (this is
2 alleged to be a material omission of fact in the Indictment) and to the fact that Mr. Sims' 1994
3 bankruptcy was not disclosed to investors (also alleged in the Indictment to be an omission of a
4 material fact).

5 **XII. JUROR QUESTIONNAIRE AND VOIR DIRE**

6 Mr. Sims would request leave of court to submit a jury questionnaire for distribution to
7 potential jurors. Mr. Sims also asks that the Court permit counsel for Mr. Sims to voir dire jurors
8 directly.

9 **XIII. OTHER MATTERS**

10 There are no other matters that Mr. Sims believe need to be addressed at this time.

11 DATED: OCTOBER 15, 2013

BERLINER COHEN

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13 /s/

FRANK R. UBHAUS

14 ATTORNEYS FOR DEFENDANT MICHAEL SIMS
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